Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Carmen Caballero Rivera, Talí Benet Soto
Petitioners

v.

The Chase Manhattan Bank; Housing Investment
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First District

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Introductory statement

The present case was dismissed at the District Court under Rule 9(b) of Federal Civil Procedure. Petitioners filed again their case at the state level, whereby Respondents removed the case to the District Court. The District Court instead of following the state law exemption doctrine on res judicata or collateral stoppel cases in diversity of citizenship, applied the federal law under Rule 9(b) of Federal Civil Procedure and dismissed the case. Thereafter, the First Circuit Court affirmed the judgment entered by the District Court that is contrary to the jurisprudence established by the Puerto Rico Supreme Court. According to the Supreme Court of Puerto Rico, Res Judicata and Collateral stoppel will not stand when there is a state cause of action and there has been no plenary trial at the federal level and the judgment affects public interest or the nucleus of the family negatively. In this case, a building can collapse with more than three hundred families and more than 1000 people with their homestead in Puerto Rico.

I. Whether the First Circuit Court failed to apply state law principles developed by the Puerto Rico Supreme Court over res judicata and collateral stoppel when this case deals with diversity of citizenship and principles of public interest and the family nucleus that is affected negatively as their homestead is in a building that can collapse with more than three hundred families and more than one thousand people living therein.

PARTIES TO THE PROCEEDING

Petitioners Carmen Caballero Rivera and Talí Benet Soto are owners of the building in question. Housing Investment Corp. is a subsidiary of The Chase Manhattan Bank. Although there are more than two hundred contracts made with the owners of the Condominium Segovia. In order to reopen the case and in order to avoid more unnecessary work this action was filed at the state court as a class action.

TABLE OF C0NTENTS

1. Question Presented For Review.....i
2. Parties to the Proceeding.....ii
3. Table of Authorities.....iv
4. Opinions Below.....1
5. Jurisdiction.....1
6. Statutory Provisions Involved 2
7. Statement of the Case 4
8. Reasons for granting the writ of certiorari.....5
9. Argument.....6
10. Conclusion.....21
11. Appendix

1. First Circuit Court decision entered on January 10, 2002, by the First Circuit Court: Hon. Bouding, Chief Judge, Hon. Kravitch, Senior Circuit Judge and Hon. Torruella, Circuit Judge.....1A
2. Judgment entered on May 17, 2001, dismissing the state filed complaint by Hon. Judge Carmen Consuelo de Cerezo, District Court Judge.....5A
3. Judgment entered on March 30, 2000 by Hon. Judge José Fusté, District Court Judge.....9A
4. Translated complaint filed at the state court on May 3, 2000.....21A

TABLE OF AUTHORITIES

Cases:

American Airlines Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998).....18
Apparel Art International Inc. v. Amertex Enterprises, Ltd. 48 F.3d 576 (1st Cir. 1995).....17
Arzuaga-Collazo v. Oriental Federal Savings Bank, 913 F.2d 5 (1st Cir. 1990).....19
Barden v. Northen Pacific Railroad Company 154 U.S. 288, 38 L. Ed. 992, 14 S. Ct. 1030 (1894).....18
Berrios Rivera v. British Ropes, Ltd., 575 F.2d 966 (1st Cir. 1978).....12
Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420, 547.....19
Decosta v. Columbia Broadcasting System Inc., 520 F.2d 499 (1st Cir. 1975).....18
Doe v. In re Urohealth Systems, Inc., 216 F.3d 157 (1st Cir. 2000).....17
Erie v. Tompkins 304 U.S. 64 (1938).....7
Equal Employment Opportunity Commission v. Waffle House, Inc., No. 99-1823 (U.S. 01/15/2002).....18
Federated Department Stores Inc. v. Moitie, 452 U.S. 394 (1981).....17. 15
Feliciano Ruiz v. Alfonso Development Corp., 96 P.R.R. 105, 111 (1968).....11
Figueroa v. Municipality of San Juan, 98 P.R.R. 523, 545 (1970).....11
Francisco Ramos Gonzalez v. Francisca Félix Medina, 121 P.R.R. 302 (1988).....2,10,11
Futura Development Corp. v. Centex, 761 F.2d 22 (1st Cir. 1985).....17
Géigel v. Mariani 85 P.R.R. 43, 47 (1962).....2,7,18
González v. Agostini, 79 P.R.R. 481 (1956).....2,7,18

Gonzalez v. Fireman's Fund Insurance Co., 385 F. Supp. 140, 146 (D.P.R.1974).....11
Heiser v. Woodruff, 327 U.S. 736 (1946).....7,16
In re Burrus, 136 U.S. 586, 593-594 (1890).....11
In re El San Juan Hotel Corp., 841 F.2d 6 (1st Cir. 1988)...17
In The Matter Of: Constructora Maza, Inc., v. Housing Investment Corp., 93 B.R. 838; 1988 U.S. Dist. LEXIS 13808.....13
Johson v. SCA Disposal, 931 F.2d 970; 1991 U.S. App. LEXIS 8189 (1991).....16
Kale v. Combined Insurance Co., 924 F.2d 1161 (1st Cir. 1991).....17
Medina v. Chase Manhattan Bank, N.A., 737 F.2d 140 (1st Cir. 1984).....18
Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).....19
Navarro-Avala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991).....18
Perez v. Bauza, 83 P.R.R. 213 (1961).....11
Porn v. National Grange Mutual Insurance Co., 93 F3d. 31 (1st Cir. 1996).....17
Rivera-Puig v. Garcia-Rosario 983 F.2d 311 (1st Cir. 1992)19
Rodriguez v. Baldrich 628 F.2d 691 (1st Cir. 1980)..11,16,18
Romany v. Colegio de Abogados de P.R., 742 F.2d 32 (1st Cir. 1984).....19
Romany v. Rico, 742 F.2d 32 (1st Cir.1984).....18
Rose v. Town of Harwich, 778 F.2d 77 (1st Cir. 1985).....16
Santasucci v. Gallen, 607 F.2d 527 (1st Cir. 1979).....19
Semtek International Inc. v. Lockheed Martin Corp. 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).....17
United States v. Cunan, 156 F.3d 110 (1st Cir. 1998).....17
United States v. E.C. Knight Company, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1995).....18
United States v. Yazell, 382 U.S. 341 (1966).....11

STATUTES

PUERTO RICO STATUTES
31 LPRA Sec. 1851.....12,16
31 LPRA Sec 1852.....12

USA STATUTES
28 USC. Sec. 1441.....1
28 USC. Sec. 1446.....1
28 USC. Sec. 1291.....1
28 USC 1254(1).....2

Rules

Rule 9(b) of Federal Civil Procedure.....passim
Rule 41 (b).....2,13

Amendments to the Constitution:
Section 1 of the 14th Amendment of the U.S. Constitution...2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Carmen Caballero Rivera and Talí Benet Soto (Petitioners) by undersigned counsel, under appropriate rules of this Court, respectfully request that this Court issues a writ of Certiorari to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Order and Judgment of the United District of Puerto Rico, case number 00-1858 CCC and the Opinion and Judgment entered by the First Circuit Court, case number 01-1985, Judgment entered by the District Court under Hon. Judge José Fusté, case number 99-1375; are unreported.

JURISDICTION

Statutory basis for Jurisdiction: The district court obtained its jurisdiction based on 28 USC. Sec. 1441 and 1446, diversity of citizenship. The First Circuit Court had jurisdiction under the provision of 28 USC. Sec. 1291. Petitioners invoke this Court's jurisdiction under 28 USC

1254(1). The First Circuit issued the companion opinion of the case on January 10, 2002.

STATUTORY PROVISIONS INVOLVED

This appeal is based under the exemption doctrine developed by the Supreme Court of Puerto Rico that states that no res judicata or collateral stoppel will stand when there are concerns of public interest or when the family nucleus is affected negatively by a court's decision.

Under Puerto Rico or state law, there is an enormous amount of public interest in the safety of what it is constructed, according to. Géigel v. Mariani 85 P.R.R. 43, 47 (1962) and González v. Agostini, 79 P.R.R. 481 (1956). Also when there is a situation that affects negatively the family nucleus, res judicata and collateral stoppel will not stand, according to Francisco Ramos Gonzalez v. Francisca Félix Medina, 121 P.R.R. 302 (1988) 1988 PR Sup. LEXIS 190.

Section 1 of the 14th Amendment of the U.S. Constitution provides:

All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 9(b) of the Federal Rules of Civil Procedure provides:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 41(b) provides:

Involuntary dismissal: Effect Thereof: For failure of

the plaintiff to prosecute or to comply with these rules or any order if the court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

This action was originally filed with the District Court for Puerto Rico. It was dismissed on March 30, 2000, by the District Court under Hon Judge José Fusté, under Rule 9(b) of Federal Civil Procedure. The case was filed under diversity of citizenship. The Petitioners were trying to lift the judgment entered in 1986 for fraud upon the court by Respondents. Petitioners did not appeal their case before the First Circuit Court because the public interest involved and because the homestead of more than three hundred families are affected. See Judgement on Appendix, page 9A.

Petitioners filed their complaint at the state court, following the exemption for res judicata and collateral stoppel principles under state law developed by the Supreme Court of the Commonwealth of Puerto Rico for diversity of citizenship cases and public interest.

Thereafter, Respondents removed the case to the District Court for Puerto Rico and it was dismissed under principles of res judicata and collateral stoppel following federal law, under Hon. Judge Carmen Consuelo de Cerezo. The First Circuit Court affirmed the decision,. See Judgement Appendix page 1A. Both federal courts did not follow or applied state law. Petitioners must point out that the judgment entered by Hon. Judge José Fusté recognized that the issue of fraud exemption applied in this case and was not bar by res judicata or collateral stoppel. Also made a fact-finding as to that the allegations made in the complaint, if true, constitute a fraud upon the court under state law. Hon. Judge José Fusté also made a finding that Respondents made all the irregular payments to the engineer that left the building in ruins and without following the plans approved by the Commonwealth of Puerto Rico. See Appendix pages

18A and 17A.

The structural study was obtained at the time that this case was under the consideration of Hon. Judge José Fusté. By these fact-findings are clear that Hon. José Fusté anticipated the possibility that the case could be filed with the state court. In other words the court accepted that the complaint as it was alleged complied with the pleadings for fraud upon the court according to state law which does not follow Rule 9(b) of Federal Civil Procedure.

This is a Certiorari from Hon. Judge Carmen Consuelo de Cerezo's judgment and not from Hon. Judge José Fusté's judgment as it mistakenly appears from the First Circuit's decision.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Under Rule 10, Rules of the Supreme Court of United States, the Honorable Supreme Court will grant a review on writ of Certiorari when a United States Court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with the state court of last resort; or has so far departed from accepted and usual course of juridical proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In the present case both, the First Circuit and the District Court did not follow state law for res judicata and collateral stoppel set up by the Commonwealth of Puerto Rico Supreme Court's decisions. The deference for such

decisions have been acknowledged by the First Circuit Court previously when there is consideration of public interest and those situations that affect the family nucleus negatively. Petitioners have been deprived of the due process of law. Therefore, the treatment to the Petitioners on this case have been totally different from previous cases and contrary to the Supreme Court of Puerto Rico decisions. This Certiorari is the last resort that these members of the family and owners have before the federal court; members of a community that maintain their homestead in this building.

Argument:

> I. Whether the First Circuit Court failed to apply state law principles developed by the Puerto Rico Supreme Court over res judicata and collateral stoppel when this case deals with diversity of citizenship and principles of public interest and the family nucleus that is affected negatively as their homestead is in a building that can collapse with more than three hundred families and more than one thousand people living therein.

Petitioners Carmen Caballero et al., contend that res judicata and collateral stoppel do not apply when no trial had been celebrated at the federal jurisdiction and there is a public interest involve or when the family nucleus is affected negatively, according to state law. Had the District and First Circuit Court read the complaint filed with the state court, it had to conclude that Respondents Chase Manhattan Bank and Housing Investment committed a fraud upon the court. In addition, it is stated how this scheme was developed against the state court and state agencies. This complaint

filed at the state court also complies with Rule 9(b) of Federal Civil Procedure. See Appendix page 20A. as required by Hon. Judge José Fusté, describing the scheme.

Neither the District Court nor the First Circuit Court addressed the issue of public interest brought by Petitioners or whether the family nucleus is affected negatively. Had both federal courts followed state law the decision would be different.

State law had to be followed in the case at bar by both the District Court and the First Circuit Court. See Erie v. Tompkins, 304 U.S. 64 (1938),,where the Supreme Court decided that diversity citizen cases must follow state law. In Géigel v. Mariani op.cit, the Supreme Court of Puerto Rico stated categorically that there is **an enormous amount of public interest in the safety of what it is constructed**. See the statement on page 47 of the case. See also González v. Agostini, op. cit. The U.S. Supreme Court already determined that federal res judicata principles only apply on non diversity cases. See Heiser v. Woodruff. 327 U.S. 736 (1946).

The District Court based its decision on the prior dismissal following Rule 9(b) of Federal Civil Procedure under Hon. Judge José Fusté. In this case, the state law for Res Judicata should have been followed when there is a situation of security on the construction that also places the family nucleus in jeopardy.

The Petitioners filed the enclosed translated copy of the Complaint at the state court and made the following relevant allegations concerning the fraud upon the court by Respondents: See Appendix page 21A.

> "7. The defendants, as it comes forth from some minutes dated January 14, 1975, represented by Messrs. Dionisio Ramirez and Man uel Jimenez, proceeded to make certain

agreements for engineer Agapito Font to proceed with the alignment of the building known as Condominio Segovia, without following the blue prints originally approved for the construction of the same by the concerned agency, and leaving the building in ruins.

8. That while these interventions were being made by said engineer Agapito Font, some related reports were distributed wherein he informed the agreed upon illegal interventions in order for him to be paid for his services by the defendants.

9. That prior to the reports made by engineer Agapito Font, he would go by the offices of Housing Investment Corp., and Housing Investment Corp., subsidiary of Chase Manhattan Bank, would pay for his fees with corporate checks.

10. That with the purpose of making all those illegal repairs, the defendants put in an escrow account the amount of $655,000.00 from which payments were made for the alleged repairs, knowing that the same were illegal and would endanger the security of the people in the building.

11. Engineer Agapito Font appeared for a deposition and under oath declared that the reports were certifications, that he had fixed the building, and that the same was in perfect condition.

12. Later on, the defendants, during the month of November 1994, used that evidence in a motion under oath for summary judgment, to obtain the dismissal of case

79-7994, supra, before the Superior Court of Puerto Rico.

13. That among other things, engineer Agapito Font cut an unnumbered amount of iron rods from the transversal weight columns "shear walls", and substituted them with steel plates.

14. That Agapito Font stated in a deposition under oath having repaired and certified the Condominio (Condominium) Segovia, presenting the referred reports or briefs, knowing that the building's concrete walls do not comply with the demands of the Building Code.

15. That this technique utilized causes a column defect, that when force is made with the concrete, the same breaks and the building may collapse.

16. That the shear walls provide ductility for the building in cases of hurricanes or earthquakes. Therefore, the building lacks capacity to withstand earthquakes or hurricanes.

17. That in a Motion for Summary Judgment the attorneys for the defendants appeared and used the reports or briefs of engineer Agapito Font, under oath, and before the consideration of the Superior Court, in case 79-7994, and obtained the dismissal of the pending litigation through summary judgment on January 31, 1986, knowing that the reports were created in an illegal manner and that perjury was being committed.

18. That the judgment of the Superior Court dated January 31, 1986, determined that

> the said construction deficiencies were repaired and certified by engineer Agapito Font, this based on the reports, briefs or certifications of the repairs presented by the defendants before the court in order to perpetuate the fraud by the attorneys of the defendants.
>
> 19. That litigation 79-7994, supra, had been presented in order to find a remedy to the hidden defects affecting said building, among these, the cutting of the iron rods in the columns "shear walls", for which it was therefore dismissed because of the defendant's fraudulent acts, by not being able to evidence the defects".

The First Circuit Court also did not pay attention to the decision made by the Supreme Court of Puerto Rico in Francisco Ramos Gonzalez v. Francisca Félix Medina, 121 P.R.R. 302 (1988), 1988 PR Sup. LEXIS 190, a diversity of citizenship case and dismissed by Hon. Judge Carmen Consuelo de Cerezo at the district court level. Included on the Appendix page 5A. The Supreme Court of Puerto Rico decided that the family nucleus and how it is affected negatively goes beyond and above the defense of res judicata and collateral stoppel. The Supreme Court resorted to Civil law because the civil law on res judicata requires looking into problems of family representation. Because of the family nucleus was affected negatively and because it was a state action, the Puerto Rico Supreme Court allowed the Plaintiffs appellants to continue with their cause of action at the state court, notwithstanding the fact that the case had been dismissed by the District Court. The Supreme Court of Puerto Rico stated that it will no followed dismissal by technicalities when the family nucleus is in jeopardy as there is public interest also in

those situations. The married couple had been the object of an aggression by state police. In this case as it seems clear the family nucleus can end up loosing their lives or their homestead or both. It is clear that Family Law has been traditionally permeated with an intensely compelling state interest. In addition, the parties under this type of specific situation are not to be penalized for, as in this case, not amending the complaint with the federal court. See Francisco Ramos Gonzalez v. Francisca Félix Medina, op. cit.; 18 Wright, Miller & Cooper, Federal Practice and Procedure-Jurisdiction and Related Matters (Res Judicata) sec.4459, at 523. St. Paul Minn., West (1981). Both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. In re Burrus, 136 U.S. 586, 593-594 (1890); United States v. Yazell, 382 U.S. 341, 349, 353 (1966) A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352 (1966).

The Puerto Rico Supreme Court has consistently maintained that, as a matter of public policy, the doctrine of res judicata should not be applied if it would defeat the ends of justice. See also Figueroa v. Municipality of San Juan, 98 P.R.R. 523, 545 (1970); Feliciano Ruiz v. Alfonso Development Corp., 96 P.R.R. 105, 111 (1968); Perez v. Bauza, 83 P.R.R. 213, 218-20 (1961); Gonzalez v. Fireman's Fund Insurance Co., 385 F. Supp. 140, 146 (D.P.R.1974). See also Rodriguez v. Baldrich 628 F.2d 691 (1st Cir. 1980) a case dismissed with prejudice at the state court of Puerto Rico and the First Circuit Court determined that under diversity of citizenship the Court will look into the res Judicata doctrine under Puerto Rico law. The First Circuit

Court said that: "The courts of Puerto Rico have recognized that in certain cases, the policies of res judicata are not well served by literal application of the procedural rules of the courts." Thereby citing Berrios Rivera v. British Ropes, Ltd., 575 F.2d 966, 970 (1st Cir. 1978). This case was remanded to the District Court for reviewing the status of Puerto Rican law concerning res judicata and its application to these facts. The District Court finally decided that the case did not involve situations or facts where the family nucleus should had been protected.

This Honorable Court should consider that in this case there are more than three hundred families with their homestead and lives at stake. In Puerto Rico, the homestead is a right for the family under 31 LPRA. Sec. 1851, which is exempted from attachment 31 LPRA Sec. 1852.

As a legal principle, the defense of res judicata, in general terms, is based on considerations of public policy and necessity: On the one hand, the interest of the State in terminating litigation in order that judicial issues may not be perpetuated. Respondents left a building in ruins and with the possibility of collapsing and committed a fraud upon the First Instance, Superior Court of Puerto Rico, as Hon. Judge José Fuste's opinion acknowledged. Probably anticipating the public interest involved in the case.

The building in question can collapse, and the District Court took judicial notice of this fact on its judgments. The complete structural study was sent to the same attorney for Respondents and to Hon. Judge José Fusté.

Had the District Court read the subsequent complaint filed with the state court and Judge Fusté judgment, it would have read all the facts concerning the fraud committed by Agapito Font in a scheme with Respondents. There was a fraud not only upon the court but also to the state agencies. Respondents obtained the use permits fraudulently from the state agencies at the end of the construction, certifying its

compliance with the original plans, in order to have it sold and recuperating its monies. In The Matter Of: Constructora Maza, Inc., v. Housing Investment Corp., 93 B.R. 838; 1988 U.S. Dist. LEXIS 13808, the Federal District Court determined that the defendant disbursed monies on their personal capacity to several subcontractors directly with its personal money and out of the credit line approved for the construction loan. Housing Investment was trying to get back a sum around some eighty four thousand dollars ($84,000.00) dollars. Hon. Judge José Fuste made that determination in that judgment. Respondents disbursed from another account the amount of more than six hundred and fifty thousand dollars ($650,000.00), among others, to Agapito Font, in order to cover structural defects and make illegal repairs, leaving the structure in ruins.

It seems clear from the facts of this case that not only a dismissal under Rule 9(b) and 41(b) of Federal Civil Procedure is not a bar to the state cause of action when this case is embellished with public interest. Public interest that has consistently maintained by the Supreme Court of Puerto Rico and will not succumb to the defense of res judicata and collateral stoppel, even when the parties do not appeal or do not take any subsequent action.

It is clear that it would be a futile exercise of resources had no allegations or evidence against the Respondents existed. If the District Court would had read the pertinent parts in the complaint filed in the state court it would have discovered all material fraudulent alleged facts against Respondents. Examination, that had to follow local rule for fraudulent acts within state law. In this case, a fraud upon the court and all frauds concocted by Respondents.

On its opinion and order on page 11 the District Court under Hon. Judge José Fuste stated:

Our inquiry, then, is whether the fraud

> exception applies in this case. "We find that it does. *Plaintiffs allege* a previously unlitigated claim of fraud, that engineer Agapito Font conspired with Defendants to present a false document and testimony to the state court, that if true, would erode the foundation of the state court judgment at issue according to the state law".

At pages 1-3 of its judgment the court stated:

> "The Plaintiffs, Carmen Caballero Rivera and Tall Benet Soto, bring this diversity action for relief of judgment against Defendants, the Chase Manhattan Bank, N.A. and its subsidiary Housing Investment Corporation, alleging that Defendants committed fraud in prior state court proceedings concerning the certification and legality of alterations and repairs done on a condominium, "Condominio Segovia" located in Hato Rey, Puerto Rico. Plaintiffs move for partial Summary judgment. They contend that the condominium is in such poor condition that it may collapse at any moment and that, as a result, it could not have met the local building and construction standards which Defendants alleged in the state court proceedings. Defendants oppose Plaintiffs, motion and cross-move for summary judgment".

On its Factual Background, the district court stated that:

> "Plaintiffs, a group of homeowners who purchased apartments at the condominium

and the Board of the condominium, filed suit in the Puerto Rico Superior Court, No. 79-994 (806), against Defendants. They alleged nonconformance with local building standards and regulations throughout the renovation and repairs to the building that Defendants financed. The state court granted Defendants' unopposed summary judgment motion. Plaintiffs allege that Defendants, in submitting their motion for summary judgment, committed a fraud in the state court proceedings by presenting fraudulent documents which attested that the condominium was repaired and certified according to state construction laws. Specifically, Plaintiffs maintain that engineer Agapito Font openly conspired with Defendants by appearing at a deposition and averring falsely that the alterations and repairs made by Defendants did not negatively impact the structure of the building and met all applicable construction laws. Plaintiffs support their allegations with a structural study conducted in 1989 by an engineer, Dr. Rafael Jiménez, which indicates that the condominium is in danger of collapsing, and proffered evidence demonstrating that Defendants directly paid Agapito Font from their own corporate accounts instead of following the proper compensation procedure. Plaintiffs contend Civil No. 99-1375 (JAF) that the building contains structural defects which do not meet applicable building standards, and that Defendants' fraudulent scheme resulted in state certification and the

permits necessary to sell and finance Condominio Segovia".

As an example of this jurisdictional problem, in Rodriguez v. Baldrich, op. cit., a case originally filed at the state court. The Circuit Court had to send the case to the District Court in order to determine how the state law applied to that set of facts. In this case, we do not have such a problem because the Supreme Court of Puerto Rico already decided that the security in the construction is of primary public interest. See Géigel, op. cit. If the District Court already determined the involvement of Respondent in the construction, and the security of the structure of the Condominium is in question, this Honorable Court should allow this case to continue.

If local rule controls this case, in order to determine public interest or the effect on the family nucleus, local rule does not contemplate the subsequent disappearance of the homestead of more than 300 families with more than 1,000 people. In Puerto Rico, the homestead is a right for the family under 31 L.P.R.A. Sec. 1851.

The Respondents went as far as alleging that the U.S. Supreme Court or the First Circuit Court do not follow principles of public interest. For that purpose, Respondents cited the following cases in their opposition to the appeal to the First Circuit Court. Those cases do not have any relationship with public interest and do not have any relationship with Puerto Rico law. They will be examined separately.

In Johson v. SCA Disposal, 931 F.2d 970; 1991 U.S. App. LEXIS 8189 (1991), the First Circuit Court decided that when a cause of action is not included on the complaint, a second action will be barred by federal or state res judicata. In this case, no public interest existed. Under Rose v. Town of Harwich, 778 F.2d 77 (1st Cir. 1985), the First Circuit

Court acknowledged that there are "undue hardship exemptions" to allow to set aside principles of res judicata. This case also does not have any relationship with public interest. In United States v. Cunan, 156 F.3d 110 (1st Cir. 1998) there is no controversy related to public interest. In Kale v. Combined Insurance Co., 924 F.2d 1161 (1st Cir. 1991), also cited by Respondents, do not have any relationship with public interest. Kale v. Combined Insurance Co., op. cit., is also a case that in no way deals with public interest. In *Semtek International Inc. v. Lockheed Martin Corp.* 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001), also a case that deals with statute of limitations and in no way is related to public interest. Doe v. In re Urohealth Systems, Inc., 216 F.3d 157 (1st Cir. 2000), cited by Respondents to the First Circuit Court and does not have any relationship to public interest. In Porn v. National Grange Mutual Insurance Co., 93 F3d. 31 (1st Cir. 1996), another case that does not deal with public interest. In re El San Juan Hotel Corp., 841 F.2d 6 (1st Cir. 1988), a case dealing with bankruptcy and in no way related to public interest. In Apparel Art International Inc. v. Amertex Enterprises, Ltd. 48 F.3d 576 (1st Cir. 1995), a case dealing with RICO Act and in any way related to public interest. In Federated Department Stores Inc. v. Moitie, 452 U.S. 394 (1981), a case dealing with an Antitrust action. Some plaintiffs were allowed to continue with the case.

It seems clear that the District Court and the First Circuit Court did not give any attention to the controversy of public interest and the situation of the family nucleus when the lost of its homestead is at stake. This situation was raised on Petitioners' motions and briefs in both the District and First Circuit courts. Results will be the same under federal or state jurisdiction under public interest consideration.

For example in Futura Development Corp. v. Centex, 761 F.2d 22 (1st Cir. 1985), the First Circuit Court accepted

the validity of principles of fraud and public interest. See also Medina v. Chase Manhattan Bank, N.A., 737 F.2d 140 (1st Cir. 1984); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991), talking and acknowledging about public interest litigation; Rodriguez v. Baldrich., op. cit.; Romany v. Rico, 742 F.2d 32 (1st Cir.1984); American Airlines Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998); Géigel v. Mariani , op. cit., and González v. Agostini, op. cit., declaring that the safety in the construction is of public interest. See also Decosta v. Columbia Broadcasting System Inc., 520 F.2d 499 (1st Cir. 1975). At the Supreme Court we can read the following cases related to public interest: United States v. E.C. Knight Company, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1995).; Equal Employment Opportunity Commission v. Waffle House, Inc., No. 99-1823 (U.S. 01/15/2002); Barden v. Northen Pacific Railroad Company 154 U.S. 288, 38 L. Ed. 992, 14 S. Ct. 1030 (1894). In this last cited case, the Supreme Court defined what is public interest. The Court said:

> "[T]he general rule, when grants relate to matters of public interest, is thus forcibly expressed by Chief Justice Taney: "The object and end of all government," said the Chief Justice, speaking for the court, "is to promote the happiness and prosperity of the community by which it established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to

> accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations." Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420, 547 (1837).

The District Court under Hon. Judge Carmen Cerezo should have abstained to exercise its jurisdiction. The complaint was filed with the state court. This only affects the desirability of abstention. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21-22, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). The Petitioners, among other things, were seeking to get a remedy, under the determinations made Hon. Judge Fuste under the public interest and safety of family nucleus doctrine that the District Court did not even address on its judgment.

The abstention doctrine, according to the First Circuit Court is required when: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law controls; and (6) whether the state forum will adequately protect the interests of the parties. See among others, Rivera-Puig v. Garcia-Rosario 983 F.2d 311 (1st Cir. 1992). Romany v. Colegio de Abogados de P.R., 742 F.2d 32 (1st Cir. 1984); Santasucci v. Gallen, 607 F.2d 527 (1st Cir. 1979). In Arzuaga-Collazo v. Oriental Federal Savings Bank, 913 F.2d 5 (1st Cir. 1990), the First Circuit even admitted that those cases involving construction defects usually are seen in the state courts. following the state jurisprudence. In this case, none of the forums followed the principles of public interest on the security of the construction that dictates the policy when the construction in question presents a clear danger to the inhabitants.

Petitioners should point out that the First Circuit Court went into looking some three previous judgments that were never part of the appeal filed. On its judgment the First Circuit states at footnote that in the "interest of brevity, we refrain from discussing the lawsuits filed by plaintiffs against defendants in 1985, 1992 and 1995 over the same issue". The First Circuit Court overviewed the fact that none of the parties involved appealed the judgment entered by Hon. Judge José Fusté that made a determination as to that there was no res judicata or collateral stoppel for this case. There were no documents from any judgments included for the record in order for the First Circuit Court to inspect or read in order to make such determination. In addition, Hon. Judge José Fusté specifically went over those judgments and made a determination that the exemption of fraud upon the court applied in that case and there was no bar for res judicata or collateral stoppel.

The First Circuit Court also made a determination that "plaintiffs failed to satisfy the pleading requirements after eight years of litigation" in order to reach its decision. It seems clear that if the judgment entered by Hon. Judge José Fusté determined in the year 2000, that the fraud upon the court was not barred by res judicata or collateral stoppel, therefore Petitioners could not be alleging fraud upon the court for the past eight years. It seems that the burden for the extension of the litigation should be placed on Respondents' shoulders and not upon Petitioners' shoulders. Especially when Respondents' conduct amount to a fraud upon the Court and state agencies.

It is clear that the District Court determined how Respondents made their participation or involvement in the construction of the building. At present, the building in question does not have the multi peril insurance required for this type of building because there is no insurance company to take any risk with this structure.

Conclusion:

As we have seen, there is no obstacle or legal impediment for not allowing the Petitioners to continue with their case at the state level. Being Hon. Judge José Fusté's decision the only judgment related to the fraud upon the court. This Honorable Court could set aside that judgment in order for the Petitioners to seek a remedy at the state court.

Neither the First Circuit Court nor the District Court followed the state law for res judicata and collateral stoppel. Federal law was applied in this case without considering the situation of the building in question that can collapse. That even the District Court under Hon. Judge José Fusté was convinced of Respondents' involvement in the ultimate ruin of the building in question by paying directly to the personnel responsible along with Respondents of the present situation.

Therefore, the Petitioners most respectfully request from this Honorable Court to Grant the petition for certiorari.

Respectfully submitted:

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